# Supreme Court of the United States

OCTOBER TERM, 1955.

No. 278.

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

KING EDWARD TOBACCO COMPANY OF FLORIDA and MAY TOBACCO COMPANY.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF AFREALS FOR THE FIETH CIRCUIT.

## PETITION FOR REHEARING.

Washington 6, D & Yorney for King Edward Tobacco

# Supreme Court of the United States

OCTOBER TERM, 1955.

No. 278.

James P. Mirchell, Secretary of Labor, United States Department of Labor;

Petitioner.

US.

King Edward Tobacco Company of Florida and May Tobacco Company,

Respondents.

ON WEST OF CERTICRARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIETH CIRCUIT.

## PETITION FOR REHEARING.

Respondent May Tobacco Company respectfully requests a rehearing upon the following grounds.

I

The Court's opinion (p. 8) states that delivery of the tobacco at the receiving platform of the packing plant is delivery 'to market' within the meaning of Section 3(f) of the Fair Labor Standards Act. In the case of May, there is not a syllable in the record to support such a statement. The transfer of May's antipened tobacco leaf from its curing barn on the form to its own packing plant does not involve a sale of the tobacco leaf to others. May does

not surrender title, possession or control of the leaf until the conclusion of the bulking operation and only thereafter is its tobacco leaf sold forothers (R. K. 68). Thus, the fundamental basis for the Court's conclusion that May was not cutifled to the exemption affor had by Sections 3(f) and 13(a)(6) of the Act (i.e., that there had been a delivery to market before the bulking operation) is assume a Induced the record is precisely to the contrary.

#### II.

The Crust's opinion (p. 2) stresses that the bulking operation requires a large amount of equipment. There is absolutely no proof in the King Edward May record that this is so. Indeed, the District Court in its supplemental opinion recognized this weakness in the petitioner's case but deemed it harmless to the respondents' case (R. K. 75). Obviously, this supposed necessity for large amounts of equipment weighted heavily with this Court in excluding May from the agricultural exemption.

### III.

The Court's opinion (p. 8) states that "the bulking operation is a process which changes the natural state of the freshly enred tobacco as significantly as milling changes sugar cane." Even the expert upon whom the Government relied indicates that this cannot be so, for he says (R. K. 23) -

"Topical tobacco fermentation is but the resumption of reactions taking place in the later stages of curing in the barn that have been temporarily susbended by the leving out of the leaf."

<sup>\*</sup> Record references are the same as in the facets originally submitted.

And again (R. K. 25):

"In mearly all cases, bowever, neither the bulk methodone the case swent as initially carried out is sufficient to prepare cigar tobace. For manufacture."

Apart from these statements, we submit, with due deterence and great respect, that it is unrealistic to say that the ripening of unstemmed tobacco, which involves no application of machinery nor the aid, application nor use of any external catalyst but only simple manual labor (R. K. 69), is a process which changes tobacco as significantly as milling changes sugar cane. Sugar cane is cut, ground and pressed by the use of machinery and two different products—raw sugar and molasses—emerge.

1.V

What has been said in paragraphs I, II and III, supra, demonstrates, at the very 'cast, that the record in the May case is insufficient to justify the granting of summary paigment against May, with the consequent effect of depriving it of the opportunity to adduce evidence upon a trial in support of its claim to an exemption. For example, May should have the proportunity to show that machinery plays no part in the packing plant activities; that the equipment used at the packing plant is neither elaborate nor expensive; and that an exemble mingly high per entage of the time of May's employees at the packing plant is devoted to the simple process of plang and repiling the tobacco leaf. Upon a trial, the District Court (by stigulation of the parties) could inspect the packing plant while the bulking activities are in progress and see how unindustrialized and simple the packing plant activities really are. The Government's supplemental memorandum (p. 4) concedes that the

record against May is sparse. In view of that concession, May should have an opportunity to make a full record. This cannot prejudice the Government, but if the summary indigment stands affirmed, May will be forever depriced of the opportunity to prove its eligibility for the agricultural sexemption.

V

It may be that the Court reversed as to May as well as to Budd because it felt that a distinction between the two would result in an economic advantage to May. If this be so the decision has produced an ironical result. The opinion has sustained the validity of the area of production regulation made pursuant to Section  $\Omega(q)(10)$  of the Act. Indeed, that was the principal point of the decision. Since many farmers are qualified under the area of production regulation they do not have to comply with the minimum wage and maximum hours provisions of the Act. But May cannot qualify without abandoning its packing plant at Quiney and transferring the packing plant activities to its farm. Thus, the effect of the Court's decision is to place. May at an economic disadvantage with many other growers of f. S. Type No. 62 tobacco.

prepulse, with the minimum wage and maximum hour provisions of the Act populses the contents of a true and thus assure that employees without he presumed in the second maximum should prevail upon the trial.

<sup>&</sup>quot;This possibility was allested to at possibility of particles, supplemental memorionidine.

#### Conclusion..

May, therefore, respectfully requests, a rehearing, or, in the alternative, that the Court modify its decision to grant May a trial of the issues of fact.

Respectfully submitted, ?

Mark F. Hughts,
Attorney for Respondent,
May Tobacco Company,
15 Broad Street,
New York 5, N. Y.

Of Counsel:

WILLKIE OWEN FARR GALLAGHER & WALTON,

15 Broad Street,

New York 5, N. V.

King Edward Tobacco Company of Florida also respectfully petitions for re-hearing upon the grounds hereinabove stated.

> Militon C. Denbo, 1625 K. St., N. W., Washington 6, D. C., Attorney for King Edward Tobacco Company of Florida.

### · Certificate of Counsel.

The undersigned hereby certify that the foregoing petition for re-hearing is presented in good faith and not for delay.

> Mark F. Hughes Maton C. Denbo

> > i